

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Petition of the State of Ohio)
for Authority to Continue to)
Regulate Commercial Mobile Radio)
Services)

PR Docket No. 94-109

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

OPPOSITION OF McCaw CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw"), by its attorneys and pursuant to Section 1.106(g) of the Commission's rules, hereby opposes the Petition for Reconsideration ("Petition") of the Commission's Report and Order in the above-captioned proceeding^{1/} filed by the Public Utilities Commission of Ohio ("PUCO"). The Petition briefly describes a rate complaint proceeding currently pending before the PUCO (the "Cellnet Proceeding"), and asks the Commission for permission to supplement the Petition with the results of that proceeding.^{2/} The PUCO further requests that the Commission "indicate its willingness to accept such information" as part of any determination of the demarcation line between "preempted rate regulation and retained state authority over terms and conditions" of commercial mobile radio services ("CMRS").^{3/}

^{1/} Report and Order, FCC 95-193 (rel. May 19, 1995).

^{2/} PUCO Petition at 3-4.

^{3/} Id. at 4.

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The Petition should be dismissed or denied. The PUCO does not challenge the Commission's conclusions in the Report and Order,^{4/} and its Petition does not even attempt to articulate a fuller distinction between rate regulation and "other terms and conditions" than the Commission has provided. Rather, what the PUCO apparently seeks is authority to keep alive the Cellnet Proceeding in the hopes that the record of that case will shed some additional light on what is meant by "terms and conditions." There is no factual or legal basis for granting the PUCO's request.

The statutory preemption of state rate regulation is broad and unconditional. In preempting state authority over CMRS rates, Congress sought "[t]o foster the growth and development of mobile services, that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure"^{5/} Lawmakers recognized that a patchwork of inconsistent state regulation would undermine the growth and development of mobile services.^{6/}

^{4/} Cf. 47 C.F.R. 1.106(d)(2) (petitioner should cite findings of fact and conclusions of law he believes to be erroneous and "state with particularity the respects in which he believes such findings and conclusions should be changed").

^{5/} H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993) ("House Report").

^{6/} See H.R. Rep. No. 213, 103d Cong., 1st Sess. 490 (1993) ("Conference Report") (intent of revised Section 332 is to "establish a Federal regulatory framework to govern the offering of all commercial mobile services") (emphasis supplied); see also id. at 494 ("[T]he Commission, in considering the scope, duration, or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this

To further the legislative objectives of uniformity and the growth and development of mobile services, the Commission properly established a strong presumption against granting state petitions for authority to regulate commercial mobile services, including cellular services. Congress deliberately chose "generally to preempt state and local rate and entry regulation of all commercial mobile radio services."^{7/}

In the absence of a successful petition for rate authority, Section 332(c)(3) preempts Ohio from hearing rate complaints. Any other conclusion would effectively leave the PUCO with significant authority over rates, even though it was unable to meet the statutory test for the grant of such authority.^{8/}

subsection . . . ").

^{7/} In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1504 (1994) (emphasis supplied).

^{8/} Report and Order at ¶¶ 37-39. Cf. G. & T. Terminal Packaging Co. v. Consolidated Rail Corporation, 646 F. Supp. 511 (D.N.J. 1986), aff'd, 830 F.2d 1230 (3d Cir. 1987), cert. denied, 108 S. Ct. 1291 (1988) (barring collateral complaint against alleged rate discrimination where ICC had exempted transportation of certain goods from rate regulation). In G. & T., as here, the shipper argued that the absence of a complaint procedure left it without any remedy for price discrimination. The court disagreed:

This argument ignores that the [Interstate Commerce] Commission, in granting the exemption [from rate regulation], has determined that regulation is 'not needed to protect shippers from abuse of market power.' [Citation omitted.] . . . Congress and the Commission have determined that the market is adequate protection; it is not the place of this court to disagree with that determination.

830 F.2d at 1235-36.

In particular, having failed to demonstrate that "market conditions . . . fail to protect subscribers adequately from . . . rates that are unjustly or unreasonably discriminatory,"^{9/} the PUCO cannot now argue that it should be permitted to adjudicate complaints regarding rate discrimination.^{10/} While Section 332(c)(3)(A) reserves to states the authority to regulate the "other terms and conditions of commercial mobile services," this power is narrowly circumscribed and does not include rate discrimination or other rate issues. As the Commission has explained, a state's complaint proceedings may address only concern carrier practices that are "separate and apart from . . . rates," such as reviewing contractual agreements involving

^{9/} See 47 U.S.C. 332(c)(3)(A)(i).

^{10/} See PUCO Petition at 3. Rate regulation indisputably includes oversight of allegedly discriminatory rates as well as rate levels. See, e.g., MCI Telecommunications Corp. v. AT&T Co., 114 S.Ct. 2223, 2226 (1994) (Communications Act authorized the Commission "to regulate the rates charged for communication services to ensure that they were . . . non-discriminatory") (emphasis supplied). Such regulation can be accomplished through case-by-case adjudication of complaints as to existing rates as well as through prospective review of proposed rates. See 47 U.S.C. § 204(a) (providing for prospective hearings on a new "charge, classification, regulation, or practice") and id. § 208(b)(1) (establishing procedures for review of complaints on the lawfulness of a "charge, classification, regulation, or practice"); see also 47 U.S.C. § 202(a) (barring unreasonable discrimination in "charges, practices, classifications, regulations, facilities, or services"). In the case of cable television, rate regulation of the basic service tier is prospective; the rates for cable programming services are regulated in response to complaints. 47 U.S.C. §§ 543(b)(1)(2) (basic service tier), 543(c) (cable programming services).

transfers of control and interconnection and roaming arrangements.^{11/}

From the PUCO's summary description of the Cellnet Proceeding, it appears that a number of the issues it is attempting to adjudicate concern rates. For example, the PUCO states that it is trying to resolve various allegations involving the provider's failure to keep separate accounting records, unlawful cross-subsidization, and differences between wholesale and retail rates.^{12/} The Petition provides no additional information to justify this continuing effort to regulate CMRS rates. To the extent that the allegations in the Cellnet Proceeding relate to rates, the Report and Order has rendered the PUCO without authority to adjudicate them.^{13/}

With respect to the question of what "terms and conditions" remain permissible in light of the Report and Order, the Petition does not satisfy the Commission's procedural requirements and must therefore be dismissed. Based on the very general information already provided by the PUCO in this docket, the Commission could provide only general guidance regarding permissible terms and condition. The Commission made clear in

^{11/} Report and Order at ¶ 43.

^{12/} PUCO Petition at 3.

^{13/} Even assuming the events referred to in the Cellnet Proceeding occurred prior to the Congress's preemption of state rate regulation, any remedy the PUCO would prescribe is likely to be prospective. Permitting the PUCO to continue adjudicating the complaint in light of the Report and Order would be tantamount to giving it unlawful rate regulatory authority.

the Report and Order that any petition seeking clarification on this point must "specify with particularity the provisions of the Ohio regulatory practice at issue."^{14/} This the PUCO has failed to do, and its argument that the Cellnet Proceeding should be kept alive in order to provide the necessary specificity is unavailing.

If the PUCO had wanted guidance on what is meant by "other terms and conditions," it should have provided a fuller description of the activities that it believes are still within its power to regulate. Having failed to do, it is not readily apparent why the "results" of the Cellnet Proceeding would be useful in satisfying the Commission's need for particularity. The Commission should not allow the PUCO to use a defect in its own pleadings as a justification for continued rate regulation.^{15/}

^{14/} Report and Order at ¶ 44.

^{15/} To the extent the PUCO actually wishes to submit these results as "evidence" to support "the PUCO's right to pursue more traditional rate and market entry regulation in the future," Petition at 1, such a filing would be grossly out of time. The Commission asked for information regarding carrier conduct and market conditions over a year ago and, based on the data already supplied, it denied PUCO's "future" request.

For the foregoing reasons, the Commission should deny the
PUCO's Petition.

Respectfully submitted,

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